



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 19, 2023

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BOARD DECISIONS

Appellant: Troy J. Stewart
Agency: Department of Transportation
Decision Number: [2023 MSPB 18](#)
Docket Number: DC-315H-18-0729-I-1

PROBATIONARY TERMINATION DUE PROCESS INTERIM RELIEF

Effective January 22, 2017, the appellant was appointed to a career-conditional position in the competitive service, subject to a 1-year probationary period. On January 11, 2018, the agency informed the appellant that, unless he resigned on or before January 15, 2018, he would be terminated during his probationary period. On January 16, 2018, the appellant resigned, effective January 22, 2018. Based on advice from Human Resources, management requested that the appellant change his resignation date to Friday, January 19, 2018, his last workday prior to the expiration of his probationary period. The appellant declined to change his resignation date. Therefore, on January 19, 2018, the agency signed the paperwork to terminate the appellant "effective at the close of business on January 19, 2018." Because the appellant was on scheduled sick leave on January 19th, the agency delivered the termination notice to him via an email to his work email address and by overnight mail to his house.

The appellant filed a Board appeal challenging his termination during his probationary period. After holding a hearing, the administrative judge issued an initial decision reversing the appellant's termination, finding the following: (1) the agency failed to effect the appellant's termination prior to the completion of the appellant's probationary period; (2) the appellant's separation was therefore an adverse action under chapter 75; and (3) the agency violated the appellant's due process rights by removing him without prior notice and an opportunity to respond. The initial decision was silent regarding interim relief. However, the administrative judge issued an erratum to correct the initial decision and order the agency to provide interim relief if either party filed a petition for review. The agency filed a petition for review of the initial decision. The appellant responded and requested that the agency's petition be dismissed on interim relief grounds.

Holding: The administrative judge lacked the authority to address interim relief in an erratum.

1. Under 5 C.F.R. § 1201.112(a), the Board's regulations provide for limited situations in which an administrative judge may retain jurisdiction after issuing an initial decision, which include to correct transcripts, rule on motions for attorney fees and damages, to adjudicate petitions for enforcement, and to enter a settlement agreement into the record in an appeal in which the initial decision is not yet final.
2. The erratum in this case was outside the scope of the administrative judge's authority because it would have changed the substance of the initial decision by ordering additional relief.

Holding: The appellant was entitled to interim relief by operation of statute.

1. Because the appellant was the prevailing party and the initial decision was silent on the issue of interim relief, the appellant was entitled to interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A).
2. Notwithstanding this default rule, an administrative judge is expected to address interim relief in the initial decision. However, an administrative judge's failure to address interim relief does not relieve the agency of its statutory interim relief obligation.
3. Generally, an agency may only be relieved of its interim relief obligation by an affirmative statement in the initial decision that interim relief is not required or by a showing of undue disruption.

4. The agency's certificate of compliance, signed under penalty of perjury, was sufficient evidence of its compliance to the extent it represented it had cancelled the appellant's termination and restored him to a pay status effective April 26, 2019, the date of the initial decision and that the appellant was expected to return to duty on June 10, 2019, pending discussion with the appellant and his representative about the position to which he would return. Record evidence indicated that the appellant requested his return date be delayed until June 10, 2019.

Holding: The agency improperly removed the appellant without due process because the appellant's termination was effected after he completed his probationary period.

1. To terminate an employee for post-appointment reasons, an agency must notify the employee in writing before the employee completes his scheduled tour of duty on the day before the anniversary date of his appointment.
2. The appellant's appointment anniversary was Monday, January 22, 2018. The day before that was a Sunday, which was not a scheduled workday for the appellant. Under such circumstances, the Office of Personnel Management regulations provide that the probationer must be terminated before the end of the tour of duty on Friday.
3. Here, the agency terminated the appellant on Friday, January 19, 2018, "effective at the close of business." A termination effective *at* the end of the appellant's tour of duty does not satisfy the requirement that the appellant be terminated *before* the end of his final tour of duty.
4. Based on the specific language in the termination notice, even if the agency had actually or constructively delivered the termination notice to the appellant prior to the effective date and time stated in the notice, his separation still would not have been effected before he completed his probationary period.

Holding: The administrative judge did not err in ordering status quo ante relief.

1. Although status quo ante relief is generally addressed in addendum proceedings, under the particular circumstances of this case, the Board determined that it was appropriate to address the agency's argument on review that the scope of relief should be limited because, even if the

agency had not terminated the appellant, he intended to resign by January 22, 2018.

2. Although the appellant resigned effective the business day after the agency's termination action, the only reason he did so was to avoid termination in the first place.
3. By terminating the appellant, the agency took away the only incentive the appellant had to resign. Thus, there was insufficient reason to limit the normal scope of status quo ante relief.

COURT DECISIONS

NONPRECEDENTIAL:

Sinclair v. Department of the Air Force, [No. 2023-1390](#) (Fed. Cir. May 17, 2023) (dismissing the petition for review as premature because the Board had not issued a final order, but rather had granted the agency an extension of time to submit a notice of compliance).

Gelb v. Department of Veterans Affairs, [No. 2023-1157](#) (Fed. Cir. May 17, 2023). The Court held that the Board abused its discretion in denying the appellant a hearing after she personally failed to appear for the hearing because her representative was present, and an appellant's representative can attend a hearing on an appellant's behalf. However, after determining that the administrative judge's denial of a hearing was a procedural error not a due process violation, the Court concluded that the petitioner did not establish that the outcome of her case would likely have been different if the administrative judge had conducted a hearing because she did not identify arguments, evidence, or witnesses that would have been presented at the hearing and would likely have altered the outcome of her case. Therefore, the administrative judge's abuse of discretion was not a reversible procedural error, and the Court affirmed the Board's decision denying the appellant's request for corrective action under the WPA.

Adams v. Merit Systems Protection Board, [No. 2023-1212](#) (Fed. Cir. May 17, 2023) (summarily affirming two Board decisions that it lacked jurisdiction over a claim that the revocation of a security clearance was discriminatory and two Board decisions that dismissed the appeals because they raised materially identical claims to already-pending appeals).

Cooperman v. Social Security Administration, [No. 2022-1915](#) (Fed. Cir. May 16, 2023) (affirming the Board's decision granting the agency's request to remove the appellant from his position as an administrative law judge based on two charges: (1) Neglect of duty for failure to provide the evidentiary rationale behind his determinations, failure to memorialize off-the-record conversations, and mishandling of personally identifiable information; and (2) Conduct unbecoming based on emails with legal representatives that potentially raised a perception of partiality).

Feliciano v. Department of Transportation, [No. 2022-1219](#) (Fed. Cir. May 15, 2023) (affirming the Board's decision to deny the appellant's request for differential pay for his military service in the United States Coast Guard because his service did not qualify as an active duty contingency operation as required by 5 U.S.C. § 5538(a)).

Flynn v. Department of State, [No. 2022-1220](#) (Fed. Cir. May 15, 2023) (affirming the Board's decision to deny the appellant's request for differential pay for his military service in the Army Reserve because his activation orders under 10 U.S.C. § 12301(d) did not qualify as a contingency operation for which differential pay could be awarded).

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